

June 15, 2007

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Columbia Research Corporation

Date of Filing: March 20, 2007

Case Number: TFA-0193

On March 20, 2007, Columbia Research Corporation (CRC) filed an Appeal from a determination issued to it by the Department of Energy's Bonneville Power Administration (BPA). In that determination, BPA released some documents and withheld some information in response to a request for information that CRC filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

On January 30, 2007, CRC sent a FOIA request to BPA for documents relating to contracts between BPA and Washington2 Advocates since January 1, 2005.¹ BPA conducted a search and found 157 pages of responsive material. On February 23, 2007, BPA released some information to CRC along with a determination letter. Letter from BPA to CRC, February 23, 2007 (Determination Letter). BPA withheld some information under Exemption 6 and also withheld two items in their entirety under the deliberative process privilege of Exemption 5, but did not give any further information about the withheld items.² BPA released 9 pages in their entirety. On March 20, 2007, CRC filed this appeal of BPA's decision to withhold information under Exemption 5.

We asked BPA for comments on CRC's appeal. In response, BPA acknowledged an error in the initial processing of the request and released 96 additional pages in their entirety to CRC. Letter from BPA to CRC (April 23, 2007). However, on April 27, 2007, CRC notified OHA that BPA

¹ Washington2 Advocates is a consultant that provides strategic counsel (including advice, opinions and written reports) to BPA on national and Northwestern energy issues.

² The information withheld under Exemption 6 is not the subject of this appeal.

continued to withhold non-exempt material, specifically (1) redacted emails, (2) attachments to emails, and (3) redacted statements of work describing the activities that the consultant performed in prior months. CRC asked OHA to determine whether BPA properly withheld these documents under Exemption 5. CRC argues that some of the material withheld under Exemption 5 is factual and non-deliberative and therefore not exempt from release under the FOIA. CRC also argues that there is a significant public interest in releasing the unredacted statements of work because of the amount of the monthly payments that BPA makes to the consultant for interacting with Congress on matters of public importance.

II. Analysis

A. The Deliberative Process Privilege of Exemption 5

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974). This deliberative process privilege is often invoked under Exemption 5, and is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

CRC argued in its Appeal that the documents are not exempt from protection because many were not created by the agency. However, federal courts have held that some documents generated outside of an agency but created through agency initiative may be considered “inter-agency or intra-agency memoranda” or letters for Exemption 5 purposes. *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980). *See also State of Nevada*, 29 DOE ¶ 80,292 (2007). The agency can apply Exemption 5 to a document that is generated as part of the continuing process of agency decision-making. “Congress apparently did not intend ‘inter-agency or intra-agency’ to be rigidly exclusive terms but rather to include [nearly any record] that is part of the deliberative process.” *Ryan*, 617 F.2d at 790. Thus we conclude that the material falls under the purview of Exemption 5.

This office has conducted a *de novo* review of the documents including those pages that CRC mentioned specifically in its appeal. Our review found that the following documents contained deliberative material. First, pages 6, 7, 10, and 16 of the statements of work contain information about projects, advice and recommendations that appear to be part of the agency deliberative process. The documents include recommendations to the agency about how possible court rulings or legislation could affect agency policies. There is a similar basis for withholding on pages 24, 103-113, 125 and 156. The document on page 111 sets forth advice and opinions from the consultant to BPA about an issue of importance to BPA. Pages 115 to 122 contain draft documents. The email on page 142 concerns a proposed meeting to be conducted during a meal. The contents of that

document contain some material that could be considered part of the deliberative process. The emails on pages 145 and 146 offer advice and opinions about items under consideration by the Congress that are of interest to BPA. Finally, page 157 contains a discussion of the contents of a draft document. We find that this material was exempt from disclosure.³

Nonetheless, it is not clear why BPA withheld other portions of the responsive material. *See, e.g.*, pages 12, 13 and 15 of the statements of work. This material does not appear deliberative. The Determination Letter does not contain an adequate description of the exempt material that could assist CRC and this office in understanding why certain items on those pages were withheld.⁴ In addition, no descriptions were provided for documents that were withheld in their entirety. On remand, such descriptions must be provided.

Finally, BPA did not release any information contained in the attachments to the emails. The attachments are also considered documents, and any non-exempt material in these attachments should be released to the requester immediately.

B. Segregability of Non-Exempt Material

The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt” 5 U.S.C. § 552(b); *see also Greg Long*, 25 DOE ¶ 80,129 (1995). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency’s deliberative process, that material can be withheld. *Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (2001). *Mead Data Central, Inc. v. Dep’t of Air Force*, 566 F.2d 242 (C.A.D.C. 1977) states that non-exempt material that is “distributed in logically related groupings” and that would not result in a “meaningless set of words and phrases” may be subject to disclosure. *Mead*, 566 F.2d at 261.

BPA did not address the issue of segregability in the determination. This office reviewed a sample of the material that was withheld in its entirety, and based on our review, we find that there is some non-exempt, factual material in the responsive documents; namely the information in pages 6, 7, 11, 14, and 15 (bullet 3). Bullet 3 of Page 11 contains some material that may be factual or non-deliberative. Bullet 1 of Page 14 also contains material that may be factual. Our review also found some factual material on pages 111-113 and page 144. Thus, there is a minimal amount of non-exempt material involved and segregation of that material should not pose an undue burden for BPA.

³ CRC also asked OHA to identify the specific action or policy that BPA was contemplating for which it sought the consultant’s advice. Letter from CRC to OHA (April 25, 2007) at 3. Again turning to the federal courts for guidance, we find that the agency is not required to identify a specific decision. *Coastal States*, 617 F. 2d at 868. Rather, the agency must establish what deliberative process is involved and the role played by the responsive material in the course of that process.

⁴ Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its authors and recipients. The description need not contain information that would compromise the privileged nature of the document. *R.E.V. Engineering*, 28 DOE ¶ 80,116 at 80,543 (2000).

This material can be released to the requester without revealing the deliberative process surrounding the work of the consultant. *See Radioactive Waste Management Associates*, 28 DOE at ¶ 80,620.

C. Public Interest

The fact that the material requested falls within a statutory exemption does not preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that “[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest.” 10 C.F.R. § 1004.1.

We find that release of the properly withheld material would not be in the public interest. Although the public does have a general interest in learning about the manner in which the government operates, we find that interest to be attenuated by the fact that the properly withheld information is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is outweighed by the possible chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. *See L. Daniel Glass*, 29 DOE ¶ 80,271 (2006).

It Is Therefore Ordered That:

- (1) The Appeal filed by Columbia Research Corporation on March 20, 2007, OHA Case No. TFA-0193, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.
- (2) This matter is hereby remanded to the Bonneville Power Administration which shall issue a new determination in accordance with the instructions set forth above.
- (3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: June 15, 2007